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# GOD'S LITTLEST CHILDREN AND THE RIGHT TO LIVE: THE CASE FOR A POSITIVIST PRO-LIFE OVERTURNING OF *ROE*

*Raymond B. Marcin**

"The word of the LORD came to me, saying,
'Before I formed you in the womb I knew you.'"
Jeremiah 1:4-5

"For you created my inmost being;
you knit me together in my mother's womb."
Psalms 139:14

For those who understand that God's littlest children have the same right to life that all God's children have, the day on which the United States Supreme Court decided *Roe v. Wade*[1] was a day that echoed the grief and frustration that, more than a century earlier, accompanied the decision in *Dred Scott v. Sandford*.[2] And the day on which the United States Supreme Court decides to overturn *Roe v. Wade* and all the other pro-abortion decisions will be a day of heart-felt thanksgiving. From the pro-life perspective, however, it will not be enough, that the Supreme Court *merely* overturns *Roe v. Wade* and the other pro-abortion decisions. It is the thesis of this article that in order for the right to life of God's littlest children to be truly and genuinely recognized in our society, the Supreme Court must base

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1. 410 U.S. 113 (1973).

2. 60 U.S. (19 How.) 393 (1856).

its overruling on a pro-life rather than (as is more likely) a federalism rationale.

## INTRODUCTION: CAESAR AND GOD

The phrase "God's littlest children" will, no doubt, seem somewhat anomalous to readers of any article dealing with the law. If surveys mean anything, however, something like ninety-two percent of the people in the United States of America believe in God, or at least say they do.[3] And it is probably not much of a stretch to surmise that the vast majority of those ninety-two percent understand the concept of "God" consistently with one or another of our three most prevalent religious traditions: Christian, Jewish, or Islamic. That is, whether Christian, Jew, or Islamic, the average American probably believes in a God Who is deeply involved in and deeply concerned with the human condition.[4]

There are probably several ways of understanding the concept of law, but perhaps the simplest and most descriptively accurate way of understanding law is that it represents and describes a fundamental ordering of the human condition.

If law is profoundly concerned with the human condition, and if the vast majority of us believe in a God Who is deeply involved in and deeply concerned with the human condition, a question quite naturally arises: Why is it that when we teach and study law in our law schools and universities, we teach and study it as if God were irrelevant to the enterprise – almost as if we assume that God does not exist at all?

A century ago, Pope Leo XIII made that very point:

> "There is no power but from God." [citing Romans 13:1] . . . . [Yet t]he authority of God is passed over in silence, just as if there were no God; or as if He cared nothing for human society; or as if men, in their individual capacity or bound together in social relations, owed nothing to God; or as if there could be a government of which the whole origin and power and authority did not reside in God Himself. Thus, as is evident, a state becomes nothing but a multitude, which is its own master and ruler.[5]

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3. THE PEW FORUM ON RELIGION AND PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 5 (Pew Research Center 2008).

4. According to the Pew survey, sixty percent of Americans believe in a "Personal God." *Id.* That is, if one does the math, sixty-four percent of the ninety-two percent who believe in God believe in a "Personal God."

5. POPE LEO XIII, IMMORTALE DEI 108, 112 (Claudia Ihm ed., The Pieran Press 1981) (1855).

We have, even within the Christian tradition, ways of rationalizing our remarkably odd, dismissive attitude towards God. We raise the doctrine of "separation of Church and State" (a phrase that appears nowhere in the text of the Constitution) to the status of a civil dogma. Yet did not Jesus Himself suggest the propriety of a separation between the things of the law and the things of God with His injunction to render unto Caesar the things that are Caesar's and to God the things that are God's?[6] Law belongs to Caesar; morality belongs to God. Most Americans, if asked, would readily accept that notion as both descriptive and normative of our present mode of social thought – indeed dogmatically so.

If we pause a moment to think about it, however, we easily realize that that notion of the separation of law and morality, the one belonging to government (Caesar), the other to God, is routinely and consciously violated every day in practice. We look to our legislators to enact *moral* laws and to avoid enacting *immoral* laws, and we look to our courts to interpret laws consistently with decent *moral* principles. Law making and law interpreting, however, are the business of Caesar, and *morality* is the business of God. The fact is that we let our law makers and our law interpreters routinely tamper with the business of God. Do we let God tamper with the business of our law makers or law interpreters? The dilemma, scarcely faced and seldom recognized in our society, is that we accept a separation between the things of Caesar and the things of God – between law and morality – and yet we operate under a system that authorizes, indeed requires, Caesar to tamper with the business of God – morality – and forbids God to tamper with the business of Caesar. Our society's current operative solution to that dilemma is to make both law and morality the business of Caesar and to wipe God out of the picture. We teach and study law and the interactions between law and morality as if God were irrelevant – almost (as Pope Leo XIII put it) as if there were no God at all.

That is not a happy solution to the dilemma. It is more an avoidance than a solution, and it leaves us all in an anomalous situation. The vast majority of us believe in a God Who is deeply concerned with the human moral condition, and essentially that same majority also seems to accept the elimination of God from the law-enacting and law-interpreting contexts where morality – the business of God – has its input. Perhaps the most glaringly obvious example of the dilemma was the decision in *Roe v. Wade* engrafting onto the Constitution the right to kill God's littlest children – children whom He knew before He formed them in their mothers' wombs –

6. *Matthew* 22:21.

children whose inmost being He created and whose bodies He knit together in their mothers' wombs.[7]

## THE NATURAL LAW

As strong as the foregoing points may resonate in the minds of those who accept the Bible as the word of God, those points are indeed irrelevant in our society's system of government and jurisprudence, where law making and law interpreting (and in effect morality itself) are the business of Caesar. Thus, if those points are to have any favor, they must be clothed in the language and in the concepts that Caesar accepts.

Natural law theory is probably as old as human speculative and practical thinking. Even in its organized written form, it antedates the Catholic natural law tradition, and indeed Catholicism itself, by hundreds of years. It was the mainstay of Greek and Roman as well as Eastern political and legal thought.[8] Its Westernized and Christianized form found expression in the philosophical and theological writings of Saint Augustine, Saint Thomas Aquinas, and the early Catholic scholastic philosophers.[9] The time is long gone, however, when one could, in our modern system, appeal to the rich historical and theological pedigree of the great Western natural law tradition,[10] which traces the origin of law to the very essence of God

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7. "The word of the LORD came to me, saying, 'Before I formed you in the womb I knew you.'" *Jeremiah* 1:4-5. "For you created my inmost being; you knit me together in my mother's womb." *Psalms* 139:14.

8. *See, e.g.*, Anton-Hermann Chroust, *The Philosophy of Law of the Early Sophists*, 20 AM. J. JURIS. 81 (1975); *Natural Law and "According to Nature" in Ancient Philosophy*, 23 AM. J. JURIS. 73 (1978); Joseph P. Maguire, *Plato's Theory of Natural Law*, 10 YALE CLASSICAL STUDIES 151 (1947).

9. *See, e.g.*, Anton-Hermann Chroust, *The Fundamental Ideas in Saint Augustine's Philosophy of Law*, 18 AM. J. JURIS. 57 (1973).

10. Natural law jurisprudence suggests the existence of a higher law to which all human law, whether in the form of legislation or case law, is subservient and on which all human law depends for its validity. Natural law jurists purport to discover this higher law in understandings of human nature itself. Natural law jurisprudence has a history of a connection with religious views of law and justice. *See, e.g.*, 2 THOMAS AQUINAS, SUMMA THEOLOGICA, qq. 90-97 at 993-1024 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1911). In both its later and earlier forms, however, some forms of natural law jurisprudence existed without reference to religious doctrine. *See* MARCUS TULLIUS CICERO, CICERO'S COMMONWEALTH BOOK III, *in* 1 THE POLITICAL WORKS OF MARCUS TULLIUS CICERO 253-79 (Francis Barham trans., 1841); HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, *in* THE CLASSICS OF INTERNATIONAL LAW

Himself, and which formed the basis for all of Western jurisprudence for more than a millennium, well into the modern era.

There is a sense, however, in which a form of natural law jurisprudence is still with us. The version of natural law jurisprudence that is still with us does not, however, enjoy that rich historical and theological pedigree of the great natural law tradition, which traces the origin of law to the very essence of God Himself, and which formed the basis for all of Western jurisprudence for more than a millennium. The version of natural law jurisprudence that we have come to accept bases itself not in the mind of God, but rather in the mind of Caesar – that is to say, in the present scheme of things, ultimately in the minds of any five agreeing members of the United States Supreme Court. An orientation centered on God is not, of course, the starting point or even a focal point in today's postmodern version of natural law jurisprudence. Quite the contrary. The starting premise and indeed the main focal point of the postmodern thinking that has come to dominate the Supreme Court is, perhaps, best exemplified by Justice O'Connor's now well known description of the heart of constitutional liberty in the context of the abortion decision: "At the heart of liberty is the right to define *one's own* concept of existence, of meaning, of the universe, and of the mystery of human life."[11] The important thing in the Court's current post-modern view, exemplified in Justice O'Connor's dictum, is not reality *per se*, but rather "one's own" concept of reality. And, if we accept Justice O'Connor's subjective post-modern humanism as valid, each one of us has the constitutional right to *define* that reality for one's self. The result is a public philosophy founded on a reality, or more properly a set of individualized realities, divorced from objectivity itself and even from the *idea* of objective truth or objective reality. In a sense, taken to its logical conclusion, Justice O'Connor's dictum bespeaks a philosophical outlook either centering God in the human individual (or rather in each and every one of a chaotic gaggle of diversely

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(James Brown Scott ed., Oxford Univ. Press 1925). Positivist jurisprudence suggests that law is confined to that which is "posited" or declared to be such by an authority competent to do so. *See generally* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Hafner Press 1948) (1781). In the context of the issues involved in *Roe v. Wade*, a natural law approach would find the rights being discussed, whether the pregnant woman's right to privacy in the abortion decision or the right to life of the fetus or unborn child, in higher-law-type understandings of humanness, without any necessary reference to the Constitution, whereas a positivist approach would, for its conclusions regarding those rights, rely on the concepts and principles which are found in the Constitution, and would eschew any appeal to a higher-law concept.

11. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (emphasis added).

opinionated human individuals) or in recognizing each human individual as a "god" – but a very uncomfortable "god," a "god" who is in potential conflict with innumerable other "gods" whose claims to rights to define reality are just as valid as one's own.

Traditional Western Christian natural law jurisprudence, on the other hand, disagrees fundamentally with Justice O'Connor's post-modernism. Although recognizing and defending human liberty,[12] traditional natural law jurisprudence does not divorce that liberty from truth or reality or objectivity. Instead, the traditional natural law theory that historically formed the basis of Western jurisprudence for more than a millennium grounds reality first on logical proofs of the existence of the transcendent God,[13] and then grounds *human liberty* in a system that accepts objective truth and reality. One should not be overly sanguine about the possibility of reconciling the two starting points, i.e., the postmodern, exemplified in Justice O'Connor's dictum, and the traditional, grounded in the acceptance of an objective reality. They are fundamentally at odds. And yet there is a strange and discomforting connection between the two, i.e., between the subjective moral relativism that lurks in Justice O'Connor's dictum and the objective realism that inhabits traditional natural law jurisprudence.

One contemporary commentator has observed, with reference to the topic at hand, that

> [t]he moral discourse of the public sphere abounds with the rhetoric of natural law, to be sure; but it is terribly degraded. The most serious setbacks in our political and legal order have been done in the name of natural law, abortion rights being the most evident, but by no means the only, case in point.[14]

It is not much of a secret that, despite the dauntless efforts of the few strict constructionists and original intentists that still exist in our society, American constitutional law has ceased to be what it once was – a set of written principles to be changed only through the use of the constitutional amendatory process.[15] It may not be inaccurate to suggest that the United

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12. *See, e.g.*, 1 THOMAS AQUINAS, SUMMA THEOLOGIAE, q. 83 at 417-21 (Fathers of the English Dominican Province trans., Christian Classics 1981) (1911).

13. *See id.* q. 2, art. 3, at 13-14.

14. Russell Hittinger, *Veritatis Splendor* and the Theology of Natural Law, *in* *VERITATIS SPLENDOR* AND THE RENEWAL OF MORAL THEOLOGY 123 (J. A. DiNoia, O. P. & Romanus Cessario, O. P., eds., Midwest Theological Forum 1999).

15. U.S. CONST. Art. V.

States Supreme Court has become, in effect, an ongoing constitutional convention, creating something like a case-law constitution alongside the written Constitution. In a sense, it is all very much a natural-law-type enterprise (albeit a flawed and "terribly degraded" one) – an effort to discover the fundamental moral principles that ought to govern our society in a source other than the written words of the Constitution or the will of the Constitution-makers, and an effort by the Justices to tap into a fundamental understanding of human nature and the principles of social organization that flow therefrom. In the process, of course, the Justices do nod cursorily toward the text of the written Constitution and its legislative history; but everybody understands that the real source of the new fundamental moral norms is not so much what is *in* the Constitution as the Justices' own thoughts about what *should be* in the Constitution.[16]

The flaw in the enterprise, however, from the vantage point of legal philosophy, is that when the Justices engage in this "terribly degraded" natural-law process of constitution-making – this quest for the fundamental moral norms that ought to govern our society – they do not look where the rich historical and theological pedigree of the great natural law tradition would lead them – to the moral law that has its source in the very mind of God. They rummage elsewhere – among their own individual systems of political beliefs, among the residues of our society's deteriorating moral value structure, or among the dogmas and intimidations of a "political-correctness" movement.

The fact is that the great natural law tradition that had ruled Western jurisprudence for more than a millennium no longer dominates the scene. In its place we are left with a positivist and very pragmatic and subjective system based, in the context of the question at hand, i.e., the possible overturning of *Roe v. Wade*, on counting the votes of the nine members of the United States Supreme Court.

## A POSITIVIST RIGHT TO LIFE

The current composition of the Supreme Court may suggest to some that there is a real, if problematic, possibility for the overturning of *Roe* – the fly in the ointment being the so-called proverbial swing vote of Justice

16. An example of this phenomenon – perhaps the prime example – is the case at hand, *Roe v. Wade*, 410 U.S. 113 (1973), a case in which the United States Supreme Court first engrafted onto the Constitution a constitutional right to decide to abort a developing, prenatal baby. The Court purported to locate this right in the "constitutional" right of *privacy*, a right that nowhere appears in the text of the Constitution. Parenthetically, the right to *life*, which the Court refused to accord to the developing, prenatal baby, appears twice in the very text of the Constitution. *See* U.S. CONST. amends. V, XIV.

Kennedy. In that context, i.e., that there is a genuine possibility that a majority of the members of the Court might be willing to overturn *Roe*, it is incongruous to realize that the last challenge is not the minds of the pro-abortion faction on the Court – or even the mind of the swing-voting Justice Kennedy, who has dropped a hint or two in his opinions in the two *Carhart* cases[17] that he might be close to softening the position that he took in the *Casey* decision. No, the last, and somewhat incongruous, challenge would seem to be the minds of Justices Scalia and Thomas – the two Justices who have stood four-square for an overturning of the *Roe v. Wade* line of decisions ever since they became members of the Court. The trouble is that Justices Scalia and Thomas have taken a strong positivist stance regarding both the right to privacy in the abortion decision (they believe, in positivist terms, that no such right exists in the Constitution) and in effect, by implication, they have taken an equally strong positivist stance on the right-to-life issue. Perhaps the most well-known expression of that viewpoint came in Justice Scalia's separate opinion in the *Planned Parenthood of Southeastern Pennsylvania v. Casey* case, where he wrote:

> The States may, if they wish, permit abortion on demand, but the Constitution does not *require* them to do so. The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.[18]

Those sentences express what has come to be known as the "federalism" position – leaving the resolution of a given issue to the state legislatures. Leaving the matter of the protection of the lives of God's littlest children to the tender mercies of the fifty individual state legislatures, however, would seem to be a problematic solution at best.

Arguments for the overturning of *Roe v. Wade* can be grouped into two categories: (1) the positivist "federalism" argument that Justice Scalia currently favors – the recognition that, contrary to the assertions in the *Roe* decision,[19] nothing in the Constitution protects the right to privacy in the abortion decision (thus leaving the legislatures free to regulate the matter), and (2) the mixed positivist-and-natural-law argument that a developing

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17. *See* Stenberg v. Carhart, 530 U.S. 914, 956-57 (2000) (Kennedy, J., dissenting); Gonzales v. Carhart, 550 U.S. 124 (2007).

18. 505 U.S. at 980 (Scalia, J., concurring in part and dissenting in part) (emphasis in original).

19. Justice Blackmun, for the majority in *Roe*, located the right to privacy in the abortion decision "in the Fourteenth Amendment's concept of personal liberty and restrictions on state action." *Roe*, 410 U.S. at 153.

prenatal child has a fundamental and unalienable right to life (thus preventing the legislatures from regulating the matter). The right-to-life movement's arguments are usually grounded upon the latter, natural law position. The difficulty for the pro-life movement is that, if the Court decides to overrule *Roe*, it will most likely do so using a positivist "federalism" rationale rather than the mixed positivist-and-natural-law rationale. The challenge, therefore, and the theme of this article, is to find a strongly positivist argument in favor of the natural law position.

Attempts have been made to cast a positivist gloss on the argument that the developing prenatal child has a right to life, usually by identifying the right to life in question with the rights to life posited in the language of the Fifth and Fourteenth Amendments. Those attempts, however, have usually bogged down in question-begging circularity. The Fifth and Fourteenth Amendments' right to life inures to "persons," and a fetus may or may not be a person, depending on the medical, philosophical, or theological perspective one holds. The *Roe* Court itself, noting the lack of a medical, philosophical, or theological consensus on the issue of when human life begins, has declared that the judiciary is not in a position to impose an answer to the pivotal question as to when human life begins,[20] but the Court has given a negative answer to the question as to whether the fetus is a "person" in the constitutional sense.[21]

The question of the personhood or non-personhood of the fetus is very definitely at the heart of the constitutional ruling in the original *Roe v. Wade* case. Justice Blackmun put the issue quite clearly in his majority opinion in *Roe v. Wade*, where he wrote:

> The appellee [i.e., the State of Texas] and certain amici argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. *If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment.*[22]

Justice Blackmun then went on to list every usage of the word "person" in the Constitution, and drew the conclusion that none of those usages – and these are Blackmun's words – "indicates, *with any assurance*, that it has any

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20. *Id.* at 159.

21. *Id.* at 158.

22. *Id.* at 156-157 (emphasis added).

possible pre-natal application."[23] Some may see, in that hedging expression "with any assurance" an element of doubt, raising an "honest doubt" moral principle – the basic moral insight that if there is an honest doubt as to whether a given entity possesses "personhood," any truly humane and civilized society would and should resolve that doubt in favor of "personhood" rather than against it. Justice Blackmun, however, took the positivist position that, if the right to life of the fetus is not specifically mentioned in the Constitution, it does not exist.

It is in the context of the denial of personhood to the developing prenatal child that a telling analogy has been drawn between Justice Blackmun's denial of constitutional personhood to fetuses in his *Roe v. Wade* opinion in 1973 and Chief Justice Taney's denial of constitutional personhood to blacks, slave *or free*, in his well-known *Dred Scott v. Sandford* opinion in 1856. There have only been two times in the entire history of the Supreme Court when the Court has denied personhood to any classes of individuals. The first time was the *Dred Scott* decision in 1856 and the second was the *Roe v. Wade* decision in 1973.

The question of personhood arose in a procedural context in *Dred Scott*. The technical question involved the diversity of citizenship jurisdiction in federal courts and the issue for decision was whether Dred Scott could be considered a citizen of Missouri so as to have the legal capacity to sue Sandford, a citizen of New York, in federal court in Missouri. On that issue, Chief Justice Taney actually held that blacks could not be considered "citizens" (not even *free* blacks) because they could not be considered "people" within the meaning of that word "people" in the Constitution. These are Chief Justice Taney's words: "[N]either the class of persons who had been imported as slaves, nor their descendants, *whether they had become free or not*, were then acknowledged as part of the *people*, nor intended to be included in the general words used in that memorable instrument [i.e., the Constitution]."[24] The argument, of course, was made that *free* blacks – and at least those free blacks who lived in the *non*-slave states at the time – must have been considered "people" at the time of the adoption of the Constitution. At the very worst, the "honest doubt" sensitivity referred to above should have suggested itself to Chief Justice Taney, and – so the criticism goes – he should have resolved his "honest doubt" in favor of personhood (or "people-hood") for blacks. Cowed, perhaps, by the "political-correctness" intimidation of his day, Chief Justice Taney ruled that not even *free* blacks could be considered "people" within the meaning of the Constitution.

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23. *Id.* at 157 (emphasis added).

24. *Dred Scott*, 60 U.S. at 407 (emphasis added).

## "POSTERITY" IN THE PREAMBLE[25]

Now, back to Justice Blackmun and the original *Roe v. Wade* opinion. When Justice Blackmun, in his *Roe v. Wade* majority opinion, listed every usage of the word "person" in the Constitution (before concluding that none of those usages "indicates, *with any assurance*, that it has any possible prenatal application"[26]), he actually neglected one usage – a usage that happened, ironically, to be the one seized upon a century earlier by Chief Justice Taney. Justice Blackmun did indeed find every instance in which the *exact word* "person" appeared, but he neglected one variant of the *plural form* of that word "person" – the word "people." The word "people" is found in the well-known and often-memorized Preamble of the Constitution: "We the *People* of the United States, in Order to . . . secure the Blessings of Liberty *to* ourselves *and our Posterity*, do ordain and establish this Constitution for the United States of America."[27] The Preamble contains a clear indication that those who framed the Constitution wanted it to be interpreted in a way that secured the "Blessings of Liberty" (which presumably would presuppose the blessing of life) not only to *themselves* but also to their yet-to-be-born *posterity*. In other words, those who framed and those who adopted the Constitution seemed to be saying in the Preamble that if a question should arise as to whether a provision of the Constitution should be interpreted in a way in which the interests of yet-to-be-born *posterity* would be taken protectively into account, or in a way in which those interests would be essentially ignored, the former interpretation should be the one adopted. That, according to the Preamble of the Constitution, was the intent of the framers of the Constitution and the intent of those who adopted the Constitution, i.e., the people of the United States of America. The framers and those who adopted the Constitution intended to secure the "Blessings of Liberty," including (by presupposition) the right to life so that

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25. Much of the material in the following sections has appeared earlier in Raymond B. Marcin, *"Posterity" in the Preamble and a Positivist Pro-Life Position*, 38 AM. J. JURIS. 273, 275-76 (1993).

26. *Roe*, 410 U.S. at 157.

27. U.S. CONST. pmbl. (emphasis added). Although the Preamble may not be resorted to as a source of constitutional rights, it may be resorted to as an aid in interpreting the meaning of rights that are expressly mentioned in the main body of the Constitution, i.e., the meaning of the right to life in the Fifth and Fourteenth Amendments. *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 218, 219, at 163-64 (abridged ed. 1833).

those blessings could be enjoyed, by yet-to-be-born "Posterity."[28] If that argument has any merit, then the very text of the Constitution itself may support the pro-life interpretive approach.

But to be practical and to "give the devil his due," one must acknowledge that it would be disingenuous in the extreme to suggest that the word "Posterity" somehow refers *exclusively* to fetuses. Quite obviously the framers and adopters of the Constitution intended the word to refer to the generations yet to come – the descendants of the people of the United States of America (and probably not even in an exclusively biological sense). In that context, however, and even with that gloss of understanding, the clause represents a textually specific indication that the Constitution was intended, and presumably should be understood and interpreted, to secure "Blessings of Liberty" to descendants as yet unborn. Indeed it is not disingenuous to suggest that the Constitution places two classes of people on a par in terms of entitlement to the "Blessings of Liberty," i.e., "ourselves" and "our Posterity," and the word "Posterity"[29] is difficult to define except in terms of yet-to-be-born persons. To put the matter quite simply, from a textualist perspective, the conclusion seems inescapable that one of the purposes for the establishment of our Constitution, identified as such in the Preamble, is to secure the "Blessings of Liberty" to yet-to-be-born persons.

Here is the point: When Justice Blackmun wrote that none of the usages of the word "person" in the Constitution "indicates, *with any assurance*, that it has any possible pre-natal application,"[30] he was incorrect. He had neglected the usage of that variant plural of the word "person" that appears in the Preamble – "People" and its association with "Posterity." His conclusion that none of the usages of the word "person" in the Constitution "indicates, *with any assurance*, that it has any possible pre-natal application"

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28. The argument that a fetus might be a member of "posterity" first appeared in James Joseph Lynch, Jr., "Abortion and Inalienable Rights in American Jurisprudence: A Prospective Policy" (Unpublished Lecture, 1987); referred to in James Joseph Lynch, *Posterity: a Constitutional Peg for the Unborn*, 40 AM. J. JURIS. 401, 401 (1995). *See also* Marcin, *supra* note 25, at 293-94 (arguing that attentiveness to the interests of fetuses (yet-to-be-born "posterity") is consistent with John Rawls' *Justice Between Generations* in his A THEORY OF JUSTICE 251-58 (Harvard Univ. Press, rev. ed. 1999) (1971)).

29. *Webster's Third New International Dictionary* defines "posterity" as "the offspring of one progenitor to the furthest generation" or "descendants," and cites and quotes the "blessings of liberty" clause in the Preamble to the Constitution as its example. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1772 (1981).

30. *Roe*, 410 U.S. at 157.

is incomplete and therefore flawed – he did not analyze the implications of the inclusion of "*Posterity*" in the "We the *People*" formulation in the Preamble – and this harks back to his statement: "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment."[31]

## THE LEGISLATIVE HISTORY OF THE "POSTERITY" REFERENCE

The word "posterity," by the year 1788, could be found in many of the great documents founding and establishing the governments of the new incipient states. The Preamble of the Constitution of Massachusetts in 1780, for example, not only contained a "We . . . the people" clause, but also recognized "the goodness of the great Legislator of the universe," in affording the people an opportunity "of forming a new constitution of civil government for ourselves and posterity."[32] Pennsylvania's Constitution of 1776, completed on September 28, 1776, contained a similar reference to "posterity," announcing that "it is our indispensable duty to establish such original principles of government, as will best promote the general happiness of the people of this State, and their posterity. . . ."[33]

The original and most helpful reference to "posterity" in the context of the emerging independence movements, however, came at the very end of the Colonial Era, in June of 1776 in the Virginia Declaration of Rights.[34] Drafted by George Mason, who was later to become one of Virginia's delegates to the Federal Constitutional Convention of 1787, the Virginia Declaration of Rights proclaimed in its Preamble that the rights declared in the purview of the instrument "do pertain to them [i.e., 'the good people of

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31. *Id.* at 156-57.

32. THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 957 (Perley Poore ed., 1877) [hereinafter FEDERAL AND STATE CONSTITUTIONS].

33. *Id.* at 1541.

34. Earlier references to "posterity" in the context of fundamental rights declarations exist. "The Body of Liberties of the Massachusets Collonie in New England" of 1641 contains an example: "We hould it . . . our dutie and safetie whilst we are about the further establishing of this Government to collect and expresse all such freedomes as for present we foresee may concerne us, and our *posteritie* after us. . . ." 1 THE FOUNDER'S CONSTITUTION 428 (Philip B. Kurland and Ralph Lerner, eds., 1987) (emphasis added).

Virginia'] *and their posterity*, as the basis and foundation of government."[35] The first substantive clause of the Virginia Declaration of Rights mentions "posterity" in strongly operative terms:

> [A]ll men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their *posterity;* namely, the enjoyment of *life* and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.[36]

The emphasized language gains some importance when one realizes that at the time the original body of the United States Constitution was approved, there was no "Bill of Rights" in it. Thus the "Blessings of Liberty" clause can only have been understood either in the *positivist* context of the then extant *state* declarations and bills of rights or in *natural law* understandings of fundamental human rights. If the clause is understood in the *positivist* context, it is clear that at least some of the state declarations and bills of rights gave the term "posterity" genuine operative significance. For example, under Virginia's Declaration of Rights, the government could not divest "posterity" of certain rights, specifically the rights to *life* and liberty.

## TWO ARGUMENTS

Two arguments suggest themselves as a result of the analysis thus far, one a somewhat aggressive argument, and the other a bit less ambitious. The aggressive argument would be based on the fact that the word "Posterity" *includes* (but, of course, is not limited to) the developing prenatal child or fetus. That argument would go something like this: The "People of the United States" in 1788, when they ordained and established the Constitution, did so in order to secure the blessings of liberty to their yet-to-be-born descendants. Their yet-to-be-born descendants included those who were then *in utero* as well as the innumerable generations yet to come into existence. Both classes of descendants fit in under the term "Posterity." In this argument, the Preamble clause is urged as a textually demonstrable indication that the Constitution was intended to secure "Blessings of Liberty" for fetuses. Under this argument the full weight of the Preamble stands behind the proposition that "Posterity" (in the form both of not-yet-existent descendants and existent-but-not-yet-born descendants) merits the "Blessings of Liberty." This argument, however, is somewhat flawed: partly because it proves too much (carried to its logical conclusion, it would undo

35. FEDERAL AND STATE CONSTITUTIONS, supra note 32, at 1908 (emphasis added).

36. *Id.* (emphasis added).

both *Griswold*[37] and *Eisenstadt*[38] because there is no textual reason why the "Blessings of Liberty" do not inure to the yet-to-be *conceived* portion of "Posterity"); and partly because it gives direct operative effect to the Preamble, and the Preamble, as we shall see *infra,* cannot be used as an independent source of constitutional rights and powers, but can only be used to elucidate those which do appear in the purview of the Constitution.

The less ambitious argument would be less textualist in scope, and would draw on the oft-used "spirit and reason" rule[39] as well as the more contemporary purposive, narrative, or "evolutive" models of legislative interpretation.[40] It would allow that the ordainers and establishers of the Constitution might not have had the specific problem of the right to life of existent-but-not-yet-born descendants in mind, whether because abortion was not then a current issue or because they simply intended a reference to future generations in a generalized sense. Even under those hypotheses, however, the clause is an indication that the ordainers and establishers wanted the Constitution to be understood into the indefinite future to be as much "posterity"-oriented as "selves"-oriented.[41]

Under this analysis, admittedly less ambitious than the former, the Court, when faced with an interpretive question which could be resolved in a way

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37. Griswold v. Connecticut, 381 U.S. 479 (1965).

38. Eisenstadt v. Baird, 405 U.S. 438 (1972).

39. *See, e.g.,* Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892).

40. *See generally* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 613-18 (1988); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning,* 42 STAN. L. REV. 321 (1990); Dennis M. Patterson, *Law's Pragmatism: Law as Practice & Narrative,* 76 VA. L. REV. 937 (1990).

41. Justice Joseph Story, writing specifically about the "Blessings of Liberty to ourselves and our Posterity" clause, observed:

> [S]urely no object could be more worthy of the wisdom and ambition of the best men of any age. If there is any thing, which may justly challenge the admiration of all mankind, it is that sublime patriotism, which looking beyond its own times, and its own fleeting pursuits, aims to secure the permanent happiness of posterity by laying the broad foundations of government upon immovable principles of justice. . . . [T]here is a noble disinterestedness in that forecast, which disregards present objects for the sake of all mankind, and erects structures to protect, support, and bless the most distant generation.

STORY, *supra* note 27, at 189.

in which the concept of "posterity" is (1) taken positively and protectively into account, that is, an interpretation which is posterity-oriented, at least in part, or (2) ignored or treated negatively, would in light of the "Blessings of Liberty" clause ordinarily choose the former. This argument is more negative than positive in its casting, stressing only that interpretations which ignore or treat negatively the interests of posterity, or which fail to put posterity on the same level as "selves," are very likely not in accord with the spirit of the Constitution. It does not suggest that posterity has some affirmative claim to rights or entitlements. As applied to the *Roe* decision, however, the argument carries some force. In *Roe* the Court was faced with at least two plausible choices,[42] one of which – extending fourteenth-amendment right-to-life coverage to fetuses – was posterity-oriented in that it would have taken the interests of a portion of posterity positively and protectively into account, and the other of which – withholding fourteenth-amendment right-to-life coverage from fetuses – could hardly be said to be posterity-oriented or to put "Posterity" on the same level as "selves," in that it recognized no protectable interests of the portion of posterity in question (it did, however, recognize a severely qualified and conditioned interest of the *government* in potential human life). The Court chose that latter interpretation, and in doing so (so the argument would go) was not in accord with the spirit of the Constitution as informed by the "Blessings of Liberty to . . . our Posterity" clause.

A corollary to this second argument would be that a legislature which chooses to protect "potential" human life from the moment of conception can hardly be said to be acting *against* the spirit of the Constitution as that spirit is informed by the "Blessings of Liberty to . . . our Posterity" clause.

Both arguments and the corollary lead inexorably to a clash between two of the phrases in the Fourteenth Amendment's due process clause, i.e., the right to *liberty*, which may well include a right to privacy in the abortion decision in the abstract, and the right to *life*, which according to a reading of the spirit of the Constitution informed by the "Blessings of Liberty to . . . our Posterity" clause may well include a right of an unborn yet nonetheless extant unit of posterity to enter the outer world so that she can enjoy those blessings.[43] In the strongest understanding of this clash, the right to life

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42. A third choice was to leave the matter to the legislatures, as Justice Scalia would have us do, but that choice is not relevant to the perspective being explored in this article. In that context, however, choosing to leave the matter to the legislatures would amount merely to a postponement of the interpretive problem. The constitutionality of the legislatures' work products, be they pro-life, pro-choice, or something in between, would still have to be assessed in light of the blessings-of-liberty and right-to-life clauses.

43. The more aggressive argument would position that right to life in the "Blessings of Liberty to . . . our Posterity" clause itself. The less aggressive argument would

must always trump the right to liberty and can only be undone if the right to liberty in the equation also happens to amount to a right to life, i.e., if the continued life of the fetus is a genuine threat to the life of the pregnant woman. The principle of self-defense in the context of a genuine threat to one's life would alone justify the taking of the fetus' life. Weaker understandings are certainly possible. Quality-of-life considerations can be let into the balance, but only at the risk of turning the "Blessings of Liberty to . . . our Posterity" clause into a contentless derelict in the text of the Preamble. What seems evident is that the "Blessings of Liberty to . . . our Posterity" clause identifies us as a people who profess a caring attitude toward our descendants to the point of announcing formally and solemnly that the fundamental document of our structured self-government was ordained and established for their weal as well as ours, and so that they may enjoy what we enjoy.

## THE AUTHORITY OF THE PREAMBLE

One might expect that not much has been written about the Preamble of the United States Constitution, and even less about the "Blessings of Liberty" clause, and those suspicions would not be far off the mark. The "Blessings of Liberty" clause has, however, received fairly recent comment in Justice Douglas's concurrence in *Doe* v. *Bolton.*[44] Apart from Justice Douglas's reference, Justice Harlan referred to the clause in *Jacobson* v. *Massachusetts*:

> Although . . . one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States unless, apart from the Preamble, it be found in some express delegation of power or in some power to be properly implied therefrom. *1 Story's Const.* sec. 462.[45]

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position it where it belongs textually, i.e., in the right-to-life clauses in the Fifth and Fourteenth Amendments, and would only use the "Blessings of Liberty to . . . our Posterity" clause as an interpretive aid, identifying the spirit and reason behind the Constitution's recognition of the right to life as being as much Posterity-oriented as selves-oriented.

44. Doe v. Bolton, 410 U.S. 179, 209-15 (1973).

45. Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905). Various aspects of the Preamble are discussed in other decisions of the United States Supreme Court. *See generally* Chisholm v. Georgia, 2 U.S. (2 Dall.) 471 (1793); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 324 (1816); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 403 (1819); Barron v. Baltimore, 32 U.S. (7 Pet.) 247 (1833); League v. DeYoung, 52 U.S. (11 How.) 203 (1850); Texas v. White, 74 U.S. (7 Wall.) 724 (1869); Legal Tender Cases, 79 U.S.

Justice Harlan's reference to Joseph Story's *Commentaries on the Constitution of the United States* underscores the basic principle that the Preamble may not be referred to in order to enlarge the powers given in the purview of the instrument, but that it is permissible to use the Preamble to discover the object or purpose of the Framers:

> It is an admitted maxim in the ordinary course of the administration of justice, that the Preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute . . . There does not seem any reason, why, in a fundamental law or constitution of government, an equal attention should not be given to the intention of the framers, as stated in the Preamble.[46]

The example that Justice Story chose to illustrate this principle, although not in the context of the "Blessings of Liberty" clause, is instructive:

> For example, the Preamble declares one object to be, "to provide for the common defence." . . . [S]uppose the terms of a given power admit of two constructions the one more restrictive, the other more liberal, and each of them is consistent with the words, but is, and ought to be, governed by the intent of the power; if one would promote, and the other defeat the common defence, ought not the former, upon the soundest principles of interpretation to be adopted? Are we at liberty, upon any principles of reason, or common sense, to adopt a restrictive meaning, which will defeat an avowed object of the constitution, when another equally natural, and more appropriate to the object, is before us?[47]

If it is fair to paraphrase Justice Story's analysis and apply it to the "Blessings of Liberty" clause, one might argue the following: Suppose that the provisions in the Constitution recognizing a right to life admit of two

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(12 Wall.) 554 (1871); White v. Hart, 80 U.S. (13 Wall.) 650 (1872); United States v. Cruikshank, 92 U.S. 542 (1876); Yick Wo v. Hopkins, 118 U.S. 369 (1886); In re Ross, 140 U.S. 453 (1891); De Lima v. Bidwell, 182 U.S. 1, 106, 139 (1901); Downes v. Bidwell, 182 U.S. 270 (1901); Ponce v. Roman Catholic Apostolic Church, Porto Rico, 210 U.S. 296 (1908); and Ochoa v. Morales, 230 U.S. 139 (1913). The *Jacobson* case, however, is the one that contains the major pronouncements both on the "Blessings of Liberty" clause and on the interpretive principle with respect to the entire Preamble.

46. STORY, *supra* note 27.

47. *Id.* § 221, at 164. The quote here is from the abridged version of Story's Commentaries. It is not without significance to note that the section referred to here is, in the differently numbered unabridged version, section 462, i.e., the section cited by Justice Harlan in the *Jacobson* case. *See id.* at xxxvii, conversion table.

constructions, the one more restrictive, the other more liberal, and each of them is consistent with the words, but is, and ought to be, governed by the intent of those provisions; if one would secure, and the other defeat the securing of the "Blessings of Liberty" to our "Posterity," ought not the former, upon the soundest principles of interpretation to be adopted?

The question remains as to whether Story's principle of interpretation with respect to Preambles is indeed sound. Story himself, at one point, referred to the Preamble somewhat sanguinely as "very important, not only as explanatory of the motives and objects of framing the Constitution; but as affording the *best* key to the interpretation thereof."[48] A more contemporary constitutional scholar, however, while not inconsistent with Story, is somewhat less sanguine: "The Preamble to the Constitution of the United States illuminates the objects of the Framers and, thus, can be a guide to construction, but it is not considered to confer powers or rights."[49] In truth, the law of legislative interpretation has given Preambles a mixed reception. The early English cases gave Preambles great weight for statutory interpretation purposes.[50] The idea that Preambles ought to be used only to explicate, and not as a source of positive powers, seems to have entered our jurisprudence in the Eighteenth century.[51] That limitation is what brought the law on Preambles to its present state, recognizing them as useful in identifying the spirit and reason behind a particular piece of legislation, but not as conferring positive rights or powers; "[I]t is to the Preamble more especially that we are to look for the reason or spirit of every statute; rehearsing . . . as it ordinarily does, . . . in the best and most satisfactory manner, the object or intention of the legislature . . . ."[52]

The lesson from the case law on Preambles in general seems to be that Preambles are of limited use in legislative interpretation. They are not ordinarily regarded as controlling when they contradict the purview of the text, and they cannot be looked to as sources of rights or powers independent of those specified in the purview. Nevertheless, where there is ambiguity or

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48. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 45, at 37-38 (1847) (emphasis added).

49. CHESTER JAMES ANTIEU, CONSTITUTIONAL CONSTRUCTION § 2.21, at 31 (1982).

50. *See* Stowel v. Lord Zouch, (1797) 75 Eng. Rep. 546, 560 (K.B.).

51. *See* Copeman v. Gallant, (1716) 24 Eng. Rep. 404, 405-07 (Ch.).

52. Brett v. Brett, (1826) 162 Eng. Rep. 456, 458-59 (L.R.A. & E.).

uncertainty in the purview proper, Preambles can be resorted to as aids in discovering the spirit and reason behind the rule or principle in question.[53]

In light of the case law on Preambles in general and on the Preamble of the Constitution of the United States in particular, it would seem that some limited use may be made of the "Blessings of Liberty to . . . our Posterity" clause in shedding light on the spirit behind the Fifth and Fourteenth Amendments' rights to life and liberty.[54] In that context, some understanding of the "legislative history" behind the Preamble and the "Blessings of Liberty" clause would be relevant.

The "Blessings of Liberty" clause (it may come as a surprise to some) was not in any of the early drafts of the Constitution during the Convention of 1787. In fact, it entered very late in the proceedings, in mid-September of 1787, just a few days before the final version of the Constitution was signed by the delegates and sent to the state ratifying conventions. As of September 8, 1787, the Convention had all but agreed on a final text of the Constitution when a motion was passed to appoint a committee "to revise the stile of and

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53. *See generally* 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47.04, at 126-31 (4th ed. 1984). There has been some sentiment to the contrary in the history of Congress' treatment of the Preamble. In the August 1789 debates over amending the Constitution to insert a Bill of Rights, a proposal was introduced to insert the words "Government being intended for the benefit of the people and the rightful establishment thereof being derived from their authority alone," before "We the People" in the Preamble. The proposal, of course, was eventually rejected. During the debates, Thomas Tudor Tucker, the representative from South Carolina, argued that the Preamble "was no part of the Constitution." Additionally, others, such as Roger Sherman of Connecticut, argued that the amendment was unnecessary because the "We the People" language already expressed the principle of the proposed language. Tucker's statement was, at best, an understatement of the authoritativeness of preambles, even in the case law of his day. Sherman and those who agreed with him took a position that gave operative effect to the Preamble. CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 128-29 (Helen E. Veit et al. eds., 1991).

54. It is, of course, a fact that neither the Fifth Amendment's nor the Fourteenth Amendment's right-to-life clause was in the Constitution at the time of its adoption, but the amendatory process itself was laid out in the original text (in Article V), and thus it would be disingenuous to suggest that the Preamble expresses the spirit and reason behind the original body of the document, but not the spirit and reason behind later amendments, unless, of course, the later amendment can be understood as abrogating expressly or impliedly something in the original text. Also, as we shall see, the legislative history of the "Blessings of Liberty" clause reveals that it is tied in with the declarations or bills of rights in the various state constitutions, including, of course, their specific guarantees of rights to life and liberty.

arrange the articles which had been agreed to by the House."[55] The Preamble in the version of the draft Constitution that was referred to this Committee of Style did mention the word "Posterity," but contained no "Blessings of Liberty" clause:

> We the people of the States of New-Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia, do ordain, declare and establish the following Constitution for the Government of Ourselves and our Posterity.[56]

Four days later, on September 12, 1787, the Committee of Style reported on its work, and presented the Convention with the text of the Constitution in virtually the form in which we see it today (without the Bill of Rights and the later amendments, of course), with its present Preamble. The Convention adopted the Constitution five days later. Historian Carl Van Doren has referred to the present text of the Preamble as "[t]he most striking addition made by the Committee of Style."[57]

It is generally acknowledged that the individual author of the Committee of Style's new Preamble (the one that we see today in the Constitution) was Gouverneur Morris of Pennsylvania.[58] Morris undoubtedly would have been familiar with the Constitution of Pennsylvania of 1776 which, in its

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55. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 553 (Max Farrand ed., rev. ed. 1937).

56. *Id.* at 565. Charles C. Nott has suggested that the version quoted here was the work of Charles Pinckney, the delegate from South Carolina, and was derived from the Constitution of Massachusetts. CHARLES C. NOTT, THE MYSTERY OF THE PINCKNEY DRAUGHT 167, 169 (1908). The version quoted here was actually agreed to without debate by the Convention on August 7, 1787. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 55, at 209; DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 482 (Charles C. Tansill ed., 1927). Jonathan Elliot reports that "[o]n the question to agree to the preamble to the Constitution, as reported from the committee [of detail] to whom were referred the proceedings of the Convention, it passed unanimously in the affirmative." 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 230-31 (Jonathan Elliot ed., 1836).

57. CARL VAN DOREN, THE GREAT REHEARSAL: THE STORY OF THE MAKING AND RATIFYING OF THE CONSTITUTION OF THE UNITED STATES 160 (1948).

58. *Id.*

Preamble, mentioned "posterity" and, in its Declaration of Rights, mentioned "the blessings of liberty":

> [I]t is our indispensable duty to establish such original principles of government, as will best promote the general happiness of the people of this state, and their *posterity*.
>
> . . .
>
> A frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry, and frugality are absolutely necessary to preserve the *blessings of liberty*, and keep a government free . . . .[59]

Gouverneur Morris may or may not have drawn on the language of his home state's constitution in drafting the Preamble of the United States Constitution, but the more interesting question is why he chose to make any alteration at all in the Committee of Detail's Preamble, especially in view of the fact that that version of the Preamble[60] had been voted on and already approved by the Convention.

The history of what happened in the Committee of Style during the four days in which it worked on and revised the text of the Constitution is not well recorded and, with respect to the changes in the wording of the Preamble, even less well recorded. One is left with surmises and inferences drawn mainly from records of reactions of various delegates to the Committee's final draft on the floor of the Convention and afterwards. Perhaps the most strident of the reactions to the change in the wording of the Preamble came from Luther Martin, the delegate from Maryland, in an article in the Maryland Gazette on June 3, 1788, nearly a year after the deed had been done. Martin still felt strongly enough to juxtapose the two versions of the Preamble (the one in the draft submitted *to* the Committee of Style and the one reported out *by* that committee) and to accuse the Committee of actually trying to destroy the several state governments (Martin, of course, was not a signatory to the Constitution and argued against its approval):

> As altered, every appearance of the *existing* governments, under their respective Constitutions, is relinquished, the very names struck out, general purposes and powers given extending to every purpose of the social compact, and then *this Constitution* including all these purposes, is made the Constitution of the United States, without any reserve of the several States and their Constitutions then existing, and

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59. FEDERAL AND STATE CONSTITUTIONS, *supra* note 32, at 1541-42 (emphasis added).

60. *See supra* text accompanying note 56.

> then this Constitution enacted for these unlimited purposes, we afterwards find is expressly declared paramount to *all Constitutions*, and laws existing in the States.[61]

Martin would certainly have agreed with historian Carl Van Doren's assessment of the present Preamble as "[t]he most striking addition made by the Committee of Style."[62]

It seems probable that Luther Martin regarded all the clauses of the present Preamble together as amounting to something like a *national* Bill of Rights preempting all of the *states'* Declarations and Bills of Rights, when he wrote of the Preamble's "general purposes and powers. . . extending to every purpose of the social compact," i.e., every purpose or reason why people form governments, and he tied that reference in with a latent reference to the Supremacy Clause.[63] Elsewhere, however, Luther Martin wrote of the *need* of a *national* Bill of Rights "*prefixed* to the Constitution."[64] It may be that his objection was as to the overgenerality of the principles mentioned in the present Preamble, and that what he would really like to have seen, if state Declarations and Bills of Rights were to be preempted, was a Preamble that contained a detailed listing of basic rights, as the national Bill of Rights eventually did. That argument may, however, be difficult to square with his expressed outrage at the perceived destruction of states' sovereignty.

The objection that the Constitution, because of its Supremacy Clause, would render nugatory all states' Declarations of Rights – or at least would represent a threat of doing so – was well known and vehemently argued at the time. George Mason, the delegate from Virginia, made the point on the floor of the Convention several times. In fact, the last time he maneuvered for the insertion of a *national* Bill of Rights into the Constitution was on September 12, 1789, the very day on which the Convention was considering the work product of the Committee of Style.[65] The debate records are, again, sketchy at best, and one wonders how it was that the delegates were

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61. SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 291-92 (James H. Hutson ed., 1987) (emphasis in original).

62. VAN DOREN, *supra* note 57.

63. SUPPLEMENT TO MAX FARRAND'S THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 61.

64. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 55, at 290 (in a letter to Oliver Ellsworth, dated March 19, 1788) (emphasis added).

65. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 55, at 587-88.

persuaded to oppose Mason's Bill-of-Rights maneuver. What can be pieced together from the records is that Mason raised the point that a Bill of Rights could be prepared in a few hours and suggested that if anyone were to move to require one to be inserted in the Constitution, he would second the motion. Elbridge Gerry took the hint and made the motion. Mason seconded it. Roger Sherman of Connecticut, however, argued that the *state* Declarations of Rights are not repealed by anything in the text of the Constitution, and those *state* Declarations of Rights could be trusted to do all that a *national* Bill of Rights would do. George Mason countered with his Supremacy Clause argument, i.e., that national laws were declared to be paramount over state laws, presumably including state Declarations of Rights. Sherman's argument won the day, however, as Gerry's motion was unanimously defeated.[66]

Mason's Supremacy Clause argument seems quite strong, and one looks in vain in the records of the debates for a rebuttal. Yet there must have been one. The only recorded opposition remark was Roger Sherman's seemingly lame assertion that "the State Declarations of Rights are not repealed by the constitution."[67] More in the way of an explanation must have been given, and indeed the "unanimous" rejection of Gerry and Mason's motion is not the whole story; there is a mystery connected with the incident - there may have been two votes on the question.[68] What seems certain, if only because

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66. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 55, at 587-88. The voting was by states, not by individual delegates.

67. *Id.* at 588.

68. All the records are not in agreement that Gerry and Mason's motion to add a Bill of Rights to the final version of the Constitution was rejected unanimously. Bancroft has noted that manuscripts and printed texts of the records of the Convention "differ in an astonishing manner." The manuscript version of the Convention's Journal merely reported that the motion "passed in the negative," without indicating unanimity. James Madison's manuscript notes recorded a vote of ten aye, zero nay, and one abstention. Yet at least two printed versions of the convention's proceedings recorded the vote as follows:

> On the question for a committee to prepare a bill of rights – New Hampshire, Connecticut, New Jersey, Pennsylvania, Delaware, aye – 5; Maryland, Virginia, North Carolina, South Carolina, Georgia, no – 5; Massachusetts, absent.

JOURNAL OF THE CONSTITUTIONAL CONVENTION KEPT BY JAMES MADISON 717 (E.H. Scott ed. 1893). Bancroft referred to the anomalous reports as a "change," and indicated that "[t]he change as yet remains a mystery." 2 GEORGE BANCROFT, HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 210 n.1 (1882). *See also* JOURNAL OF THE CONSTITUTIONAL CONVENTION KEPT BY JAMES MADISON 717 (E.H. Scott ed., 1893). Scott's edition of Madison's journal not only reports the five aye, five nay, one absent vote, but also has George Mason arguing that "a general principle . .

of the mysterious anomaly in the differing reports of the votes on the bill-of-rights question is that the records do not tell us all that happened, and we are left with the necessity to surmise and infer.

The question involved in the Mason Bill-of-Rights controversy was as to how the state Declarations of Rights could be considered secure in view of the Supremacy Clause's assertion that the laws of the United States made pursuant to the Constitution were the supreme law of the land, anything in the Constitution or laws of any state notwithstanding.[69] The records of the debates on the floor of the Convention, being too sketchy to be useful on the point, leave one with the uneasy feeling that there must have been some unrecorded explanation, perhaps hidden in the simple summary of Delegate Sherman's assertion that the state declarations of rights are not repealed by anything in the text of the Constitution.

What in the Constitution itself would support the conclusion that the state Declarations of Rights are *not* threatened by the Supremacy Clause? The clue may be in the newly revised Preamble inserted by the Committee of Style. The new references to establishing justice, promoting the general welfare, and especially securing the "Blessings of Liberty to ourselves and our Posterity" are references that are usually found in the bodies of Bills or Declarations of Rights. It is not difficult to reconstruct the argument that the state Bills or Declarations of Rights are not undone or threatened by anything in the new national Constitution because the new national Constitution unambiguously proclaimed that its purpose is to *secure* the blessings of liberty, and not to curtail those blessings. On this line of reasoning, the purpose of the "Blessings of Liberty" clause was to serve as an operative buffer preventing the Constitution from being interpreted in such a way as to affect adversely any basic rights of humankind, or at least those basic rights that were then secured by state Declarations of Rights, the

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. would be sufficient . . . and with the aid of the State Declarations, a bill might be prepared in a few hours." *Id.* It does not seem inconceivable, in light of the anomalies in the journals and records, that there were two votes: the tie vote, defeating the motion, of course, but also representing the accurate viewpoints of the delegations concerning the need for a bill or declaration of rights, and then, in the aftermath of the tie vote, someone, probably Roger Sherman (the leader of the opposition to the motion) or Gouverneur Morris (the drafter of the new preamble), pointing out the existence of the "Blessings of Liberty" clause and its potential operative effect as a guarantor of the state Declaration of Rights, and then the second vote unanimously rejecting the motion to prepare a national Bill of Rights.

69. U.S. CONST. art. VI.

point being that the clause itself was intended from the beginning to have operative effect as a tool of constitutional interpretation.[70]

George Mason never abandoned his Supremacy Clause objection to the Constitution and history records that he refused to sign the Constitution on that and several other grounds.[71] What is, perhaps, meaningful in the context of this thesis that the "Blessings of Liberty" clause in the Preamble might have been intended as a response to Mason's incessant argument that the Constitution threatened states' Declarations of Rights is that, on the day after Mason had voiced his strenuous objection, he presented to the Convention a list of some nineteen suggested revisions of the Committee of Style's version of the Constitution. *Not* included in the list was a suggestion of the need for a *national* Bill of Rights.[72] The suggestion was renewed on September 15, two days later, however.[73] Whether the argument that the "Blessings of Liberty" clause provided the needed national Bill of Rights (if indeed such an argument was ever made) and gave Mason two days' pause in his thoughts on the point is not recorded. It is evident that the argument (again, if it was ever made) did not allay Mason's concern for long.

There is some evidence, however, that Mason did, indeed, vacillate in his opposition to the Constitution. George Nicholas recounted the incident in a letter to James Madison, dated April 5, 1788:

> Mr. Mason, . . . declared that, notwithstanding his objections to particular parts of the plan, he would take it as it was rather than lose it altogether; since that I have reason to believe his sentiments are

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70. Alexander Hamilton seemed to see the "Blessings of Liberty" clause in this light, i.e., as a guarantor of the liberties established in states; bills of rights, and even perhaps as constituting a national bill of rights all by itself, when he wrote:

> Here, in strictness, the people surrender nothing, and as they retain everything, they have no need of particular reservations. "We the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this constitution for the United States of America" (*sic*). Here is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our state bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government. . . . [B]ills of rights, in the sense and in the extent in which they are contended for, are . . . unnecessary in the proposed constitution . . . .

THE FEDERALIST NO. 84 (Alexander Hamilton).

71. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 55, at 636-40.

72. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 55, at 269-71.

73. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 55, at 637.

> much changed which I attribute to two causes: first the irritation he feels from the hard things that have been said of him, and secondly to the vain opinion he entertains . . . that he has influence enough to dictate a constitution to Virginia, and through her to the rest of the Union.[74]

It will be remembered that George Mason was the author of the Virginia Declaration of Rights, mentioned earlier.[75]

Here is the point: If George Mason was, indeed, trying to get the Convention to adopt a Virginia-type Declaration of Rights for the United States Constitution, and if the Committee of Style put the clause about securing the "Blessings of Liberty to ourselves and our Posterity" into the Preamble in a last minute (albeit eventually unsuccessful) effort to gain Mason's support for the final version of the document, as seems likely, then there would seem to be some connection, in the context of legislative history, between the "Blessings of Liberty" clause in the present Preamble and the Virginia Declaration of Rights. It will be remembered that the Virginia Declaration of Rights, antedating the Declaration of Independence by a month in 1776, contained perhaps the original reference to "posterity" in the context of the governmental documents that were emerging from the freedom movements in the colonies-becoming-states. The references to "posterity" in the Virginia Declaration are particularly strong:

> A Declaration of Rights made by the Representatives of the good people of Virginia, assembled in full and free convention; which rights do pertain to them and their *posterity,* as the basis and foundation of Government.
>
> 1. That all men are by nature equally free and independent, and have certain *inherent rights*, of which, when they enter into a state of society, *they cannot, by any compact deprive or divest their posterity*; namely, the enjoyment of *life* and liberty, with the means of acquiring and possessing property, and pursuing and containing happiness and safety.[76]

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74. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 55, at 296.

75. *See* FEDERAL AND STATE CONSTITUTIONS, *supra* note 32, at 1908.

76. THE VIRGINIA DECLARATION OF RIGHTS, AS AGREED TO BY THE VIRGINIA CONVENTION ON JUNE 12, 1776, *reprinted in* THE GEORGE MASON LECTURES: HONORING THE TWO HUNDREDTH ANNIVERSARY OF THE VIRGINIA DECLARATION OF RIGHTS, app. 20 (1976) (emphasis added). *See also* FEDERAL AND STATE CONSTITUTIONS, *supra* note 32, at 957.

If the Virginia Declaration of Rights did inform and influence the Committee of Style in the drafting of the Preamble of the Constitution of the United States,[77] then it would seem appropriate to look to the Virginia Declaration for an understanding of the operative force of the use of the term "posterity." According to the Virginia Declaration, rights to the enjoyment of life and liberty cannot be ceded to society, nor can persons cede those rights on behalf of their posterity. The rights to life and liberty are, in the words of the Declaration of Independence, "unalienable." The meaning is the same. They cannot be "aliened" or conveyed away to the state or to anyone else, and this inalienability applies not only to *our own* basic rights, but also to those of *our posterity.* Moreover, the basic rights enumerated in virtually all Bills or Declarations of Rights invariably include rights to life and liberty.

In recognizing the right to privacy in the abortion decision on terms so broad as to amount to a virtually unlimited right to abortion on demand, the United States Supreme Court, in its *Roe* and *Planned Parenthood* decisions, has failed to secure the blessings of liberty to a portion of our posterity. Some might be inclined to argue that the *Roe* decision has deprived a portion of our posterity of the inalienable right to life. In light of the legislative history of the "Blessings of Liberty . . . to our Posterity" clause, both propositions would seem to be tenable. To some, of course, neither proposition will seem persuasive. What cannot be gainsaid, however, is that the *Roe* decision neglected one small bit of relevant input, i.e., the fact that we, the people, ordained and established the Constitution not only to secure the blessings of liberty to ourselves, but also to secure those very same blessings *to our "Posterity."*[78] Our Constitution proclaims itself to be

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77. It is not doubted that some of the immediate verbiage of the Preamble was taken from Article III of the old Articles of Confederation, which has the states entering into a "firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare." FEDERAL AND STATE CONSTITUTIONS, *supra* note 32, at 8. However, the Constitution's Preamble so clearly speaks to people's rights, and specifically not states' rights, that the conceptual antecedent cannot possibly be in the Articles of Confederation. The Articles, because they had no occasion to do so, did not mention "posterity."

78. Thomas Paine, no stranger to the use of the word "posterity" (he used it ten times in his 1776 pamphlet COMMON SENSE), once captured the sensibility behind a people's orientation towards posterity, albeit in a different context and at an earlier time, when he retold the following anecdote:

> I once felt that kind of anger, which a man ought to feel, against the mean principles that are held by the tories: A noted one, who kept a tavern at Amboy, was standing at his door, with as pretty a child in his hand, about eight or nine years old, as I ever saw, and after speaking his mind as freely as he thought was prudent, finished with this un fatherly expression, "*Well, give me peace in my*

posterity-oriented. We, in that Constitution, have proclaimed ourselves to be a posterity-oriented people. The problem with the *Roe* decision from a positivist perspective is that, at best, the decision has failed to take that textually specific posterity orientation into account; at worst, it has denied it. In either case the *Roe* decision is wanting.

## THE *MORAL* IMPORTANCE OF A PRO-LIFE DECISION[79]

There is a *moral* flaw in the original *Roe* decision – a moral flaw that has been compounded in *Planned Parenthood* and all the other decisions that have upheld *Roe*'s essential holding. The moral flaw is easily stated in the form of an "honest doubt principle," and the "honest doubt principle," although moral rather than legal in tone, is logically related to the foregoing thesis concerning the Preamble of the Constitution. The Preamble contains a clear indication that those who framed the Constitution wanted it to be interpreted in a way that secured the Blessings of Liberty (which presumably would include the blessing of life) not only to themselves but also to their yet-to-be-born "*Posterity.*" Furthermore, when a question should arise as to whether any provision of the Constitution should be interpreted in a way in which the interests of yet-to-be-born *posterity* would be taken protectively into account, or in a way in which those interests would be essentially ignored, the former interpretation should be the one adopted, according to the intent of the framers. The Constitution contains two references to the right to life as inuring to persons. As the very existence of a pro-life/pro-choice debate in our society would indicate, there is at least an "honest doubt" as to whether a fetus – a representative of our yet-to-be-born posterity – is a "person" within the meaning of the Constitution. A pro-life interpretation of the meaning of "person" in the context of the Fifth and Fourteenth Amendments' right to life, under the guidance of the Preamble's clause insuring "Blessings of Liberty to . . . our Posterity," resolves that "honest doubt" in favor of personhood. A pro-choice interpretation of the meaning of "person" in the context of the Fifth and Fourteenth Amendments'

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> *day*." Not a man lives on the continent but fully believes that a separation must some time or other finally take place, and a generous parent should have said, "*If there must be trouble, let it be in my own day, that my child may have peace*"; and this single reflection, well applied, is sufficient to awaken every man to duty.

THOMAS PAINE, THE CRISIS, NUMBER 1 (1776), *reprinted in* THOMAS PAINE, POLITICAL WRITINGS 44, 45 (Bruce Kulick ed., 1989) (emphasis in original).

79. Much of the material in the following section appeared in Raymond B. Marcin, *The Moral Flaw in the Pro-Choice Position*, 4 NATIONAL CATHOLIC BIOETHICS QUARTERLY No. 4, 701 (2004).

right to life essentially contravenes the Constitution's commitment to "Posterity" when it resolves the "honest doubt" against personhood.

Even aside from the text of the Preamble and the Fifth and Fourteenth Amendments, the "honest doubt principle" expresses a very basic moral sentiment that is ingrained in natural law theory, and (one might suppose) in any system of ethics worthy of the appellation – if there is an honest doubt as to whether any given entity (e.g., a slave, a former slave, a fetus) is a person, any truly humane and civilized society ought to resolve that doubt in favor of personhood rather than against it.

It has not been the purpose of this article to make the case for a philosophical grounding of society's duty towards its "posterity." The case from moral philosophy would amount to a natural-law-type thesis. As we have seen, the Supreme Court is not likely to accept a natural law thesis. This article is confined to a positivist approach, pointing to the acceptance, by the framers of the Constitution and by the people who accepted it as their fundamental law, of a purpose of securing the blessings of liberty to their descendants on into the indefinite future, i.e., an acceptance of the proposition that the Constitution is to be interpreted in a posterity-oriented manner. It is one thing, however, to make the case that the Framers and our constitutional ancestors had that intent, but it is another thing to demonstrate that that intent is consistent, or at least not inconsistent, with moral theory. Interpretive principles, however, consistent they may be with original intent, are suspect in the minds of many if they are inconsistent with moral theory.

To some it may seem obvious, perhaps self-evident, that an extant generation, acting as a society, has a moral duty to care about, or at least to avoid harming, the interests of succeeding generations.[80] The parent-child analogy raised to the generalized level of society would seem compelling. The case should, perhaps, nonetheless be made.

One who has made such a case (perhaps inadvertently) is John Rawls. Rawls, a moral philosopher of the contractarian and Kantian (therefore rationalist) school, posited the now famous veil-of-ignorance device as part of his original-position analysis of justice and its fundamental precepts. Rawls' idea is that the fundamental principles of justice which are to govern a society can be arrived at by hypothesizing a group of original "justice seekers" who are motivated by a rational self-interest in trying to come up with the fundamental principles which will govern them as a society, but

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80. Christopher Lasch has observed: "[W]e are fast losing the sense of historical continuity, the sense of belonging to a succession of generations originating in the past and stretching into the future." And we are now experiencing an "erosion of any strong concern for posterity." CHRISTOPHER LASCH, THE CULTURE OF NARCISSISM 30 (1979), *quoted in* R. George Wright, *The Interests of Posterity in the Constitutional Scheme*, 59 U. CIN. L. REV. 113, 125 (1990).

who are also under a "veil of ignorance" – none of them knows his or her place in society, social status, or personal attributes, i.e., the factors which lead to inequality or favoritism, and therefore to injustice.[81] The result should be a rationally arrived at and realistic set of general precepts of justice.

One of the factors which Rawls specified as being occluded by the veil of ignorance in this scheme is one's generational identity: "The persons in the original position have no information as to which generation they belong."[82] In this way, it is thought, no principle of justice will come into being which is unfair to succeeding generations. It is a way of arriving at intergenerational justice. None of the justice seekers in the "original position" will be likely to posit an understanding of justice which will be unfair to future generations because the hypothetical justice seeker does not know whether he or she (gender too is unknown) might be a member of the future generation. Rawls explained, in the context of immediately succeeding generations:

> The question arises. . . whether persons in the original position have obligations and duties to third parties, for example, to their immediate descendants. To say that they do would be one way of handling questions of justice between generations. However, the aim of justice as fairness is to derive all duties and obligations from other conditions, so this way out should be avoided. . . . What is essential is that each person in the original position should care about the well-being of some of those in the next generation, it being presumed that their concern is for different individuals in each case. Moreover for anyone in the next generation, there is someone who cares about him in the present generation. Thus the interests of all are looked after and, given the veil of ignorance, the whole strand is tied together.[83]

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81. One might surmise that Rawls took a clue from Rousseau, who defined a nation's ideal "lawgiver" as:

> a superior intelligence, who could understand the passions of men without feeling any of them, who has no affinity with our nature but knew it to the full, whose happiness was independent of ours, and who would nevertheless make our happiness his concern, who would be content to wait in the fullness of time for a distant glory, and to labor in one age to enjoy the fruits of another.

JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT 84 (Maurice Cranston trans., 1968). Rawls had other precursors as well. *See* Raymond B. Marcin, *Justice and Love*, 33 Cath. U. L. Rev. 363, 372-82 (1984).

82. JOHN RAWLS, A THEORY OF JUSTICE 137 (1971).

83. *Id.* at 128-29.

In Rawls' scheme of things, one generation does not have a direct obligation or duty to its immediate descendants. The idea of a direct obligation or duty would lead to endless arguments over the content of the obligation or duty. The duty or obligation is derived indirectly through the use of the original-position device. The end result seems to be an intergenerational "golden rule"; we must do unto the next generation as we would do unto ourselves. Just as the biblical Golden Rule specifies no particular content, yet seems to be bursting with self-evident meaning and operative significance, so too does this intergenerational application of the original-position methodology of Rawls seems to lead inexorably to a forward-looking and progressively protective attitude towards posterity.

Just as, in this article, a relatively modest claim has been advanced with respect to the interpretation of the "Blessings of Liberty to . . . our Posterity" clause in the Preamble, so too Rawls' application of the original-position methodology to future generations is relatively modest in scope.

> [T]he original position is not to be thought of as a general assembly which includes at one moment everyone who will live at some time; or, much less, an assembly of everyone who could live at some time. It is not a gathering of all actual or possible persons. To conceive of the original position in either of these ways is to stretch fantasy too far; the conception would cease to be a natural guide to intuition.[84]

In the same way, the argument has been advanced in this article that the "Blessings of Liberty to...our Posterity" clause is best interpreted not as directly securing those blessings to all yet-to-be-born or yet-to-be-conceived members of posterity, but rather as an interpretive aid, a posited guide to intuition when we are faced with fundamental questions as to the meaning and scope of basic concepts set forth in the Constitution.

Rawls never applied his original-position analysis to the specific problem that is the subject of this article. His major example was in the area of economic intergenerational justice.[85] His words and his allusions, however, would seem to have implications in many other contexts: "[I]magining themselves to be fathers, [the justice-seekers] are to ascertain how much they should set aside for their sons by noting what they would believe themselves entitled to claim of their fathers."[86] If justice-seekers are to put themselves hypothetically in the position of Rawls' yet-to-be-born children for the purpose of devising economic principles which will be fair to the next generation, it would seem an *a fortiori* point to suggest that a similar

84. *Id.* at 139.

85. *Id.* at 284-93.

86. *Id.* at 289.

hypothetical positioning is warranted when the principle at issue is life itself. Rawls' approach to intergenerational justice has been critiqued.[87] It and approaches like it have, however, proven useful in theses concerning protection of the environment, economic waste, and other phenomena affecting yet-to-be-born people.[88]

## THE CURRENT SITUATION

Where has the moral flaw in the *Roe v. Wade* opinion led us? In the context of the abortion debate in the decades following *Roe*, our society's set of values has for some time now, and for unfathomable reasons, awarded "sensitivity" to those who favor abortion rights, and denied it to those who favor protecting the lives of pre-birth children. The "honest doubt principle" aside, there is, undoubtedly, sensitivity among those who hold to the pro-choice position, ranging from whatever sensitivity and comfort the fundamentalist absolutism that some in the pro-choice movement may be able to draw from their unblinking zeal all the way to the sensitivity and comfort derived from an honest pro-choice admission of the tragedy and perhaps horror that accompanies the recognition of what abortion truly *is*. Many pro-choice advocates are now opting for one version or another of the latter vantage point – an honest recognition of what an abortion truly involves.

It is recently, and principally in the context of the national debate over partial-birth abortion,[89] that our society has begun to recognize a sensitivity on the pro-*life* side of the ledger. Partial-birth abortions are not only horrible to contemplate; we are beginning to sense that they are very likely horribly painful to the all-but-completely-born child. Research published in the prestigious British medical journal *The Lancet* in 1994 concluded that at some time during the second trimester, human fetuses exhibit all the physiological indications that would justify a finding of pain in a newborn baby. The article ends with a humane but somewhat startling suggestion:

> Just as physicians now provide neonates with adequate analgesia, our findings suggest that those dealing with the fetus should consider making similar modifications to their practice. This applies not just to diagnostic and therapeutic procedures on the fetus, but possibly also

87. *See* Richard A. Epstein, *Justice Across the Generations*, 67 TEX. L. REV. 1465-66 (1989).

88. Wright, *supra* note 80, at 125, and authorities cited therein.

89. *See generally* Gonzales v. Carhart, 550 U.S. 124.

> to termination of pregnancy, especially by surgical techniques involving dismemberment.[90]

The technical language of science sometimes masks the horror of a reality: fetal children in the womb, *The Lancet* article tells us, feel pain (surely one must be alive in order to feel pain), and physicians should consider anaesthetizing them whenever they dismember them – alive – in the womb. According to the medical scientists cited by the American Life League, the neuro-anatomical structures that are needed in order to "feel" pain, i.e., the thalamus and the motor nerves that send a message to the base of the brain, are present in the fetus by the *eighth* week of pregnancy.[91] Some physicians, however, say that the fetus, at the eighth week, would not be capable of experiencing what adult human beings perceive as pain, because the nerve connections between the thalamus and the cerebral cortex are not developed enough until the *twenty-sixth* week of pregnancy.[92] Other physicians agree with the authors of *The Lancet* article, and would place the onset of the pain experience as early as that eighth week, arguing that the cortex is not involved in the *experience* of pain.[93]

What if we were to apply the "honest-doubt" moral sensitivity to the issue of fetal pain? Even if there is only an honest doubt as to whether a child in the womb feels pain (and *The Lancet* findings would seem to place the issue in the area of honest doubt), any truly humane and civilized society would and should resolve that doubt in favor of the thesis that fetuses do feel pain.

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90. Xenophon Giannakoulopoulos, Waldo Sepulveda, Ploutarchos Kourtis, Vivette Glover & Nicholas M. Fisk, *Fetal Plasma Cortisol and β-endorphin Response to Intrauterine Needling*, 344 LANCET 77, 80 (1994) (internal footnote omitted).

91. AMERICAN LIFE LEAGUE, FETAL PAIN: AN AGONIZING REALITY (2005), http://www.all.org/article.php?id=10113.

92. *See, e.g.*, Stuart W. G. Derbyshire, *Can Fetuses Feel Pain?*, 332 BRIT. MED. J. 909, 909-10 (2006).

93. *See, e.g.*, AMERICAN LIFE LEAGUE, *supra* note 91; JOHN C. WILLKE & BARBARA H. WILLKE, WHY NOT LOVE THEM BOTH?: QUESTIONS & ANSWERS ABOUT ABORTION 94-99 (1997). Jean A. Wright, M.D., M.B.A., has stated that "[u]nborn infants have pain receptors on their face by seven weeks of development, and over their entire body by the twentieth week of gestation in the same or greater density than adults." Jean A. Wright, *Advances in the Understanding of Fetal Pain*, 9 THEOLOGY MATTERS 4, 4 (2003). Dr. Wright also expressed the opinion that "[i]t takes less of a noxious stimulus to create pain in the unborn child," because although "[t]he fibers and substances needed to feel pain are present...the mechanisms needed to modulate and tone down the response to pain are poorly developed." *Id.* at 6.

It is sometimes argued, however, that anesthesia administered to the mother during the abortion procedure also anesthetizes the baby. This argument came up prominently and was as prominently refuted during the early debates over the federal proposal to ban partial-birth abortions. Dr. Jean A. Wright, Associate Professor of Pediatrics and Anesthesia at Emory University's School of Medicine, testified that "local anesthetics rarely have any effect on the fetus."[94] Dr. Wright went on to explain: "The administration of intravenous sedation/anesthesia has minimal effects on the unborn due to two mechanisms: 1) The mother's liver clears much of the drug, and 2) the drug must cross from the mother's blood stream into the placenta before reaching the fetus."[95]

It is difficult to argue that the abortion techniques currently in use do not involve pain – unspeakable pain if indeed the child indeed feels it. Even pro-abortion advocates seem to be recognizing it, albeit grudgingly. Pro-choice activist Naomi Wolf wrote in an issue of *The New Republic* several years ago:

> [F]eminism at its best is based on what is simply true. . . . While images of violent fetal death work magnificently for pro-lifers as political polemic, the pictures are not polemical in themselves: they are biological facts . . . . We know this . . . . To insist that the truth is in poor taste is the very height of hypocrisy.[96]

A self-proclaimed pro-choice physician in Great Britain, Professor Vivette Glover of the Queen Charlotte's and Chelsea Hospital in London, has concluded that, "[b]etween seventeen and twenty-six [weeks] it is increasingly possible that [the fetus] starts to feel something and that abortions done in that period ought to use anesthesia."[97]

Back in 1984, after President Reagan had made the statement publicly that fetuses often feel pain during abortion procedures, the reaction from the pro-choice community was, predictably, derisively dismissive. In response to that derisively dismissive reaction, twenty-six professors and practitioners of

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94. Jean A. Wright, M.D., Testimony before the House of Representatives Committee on the Judiciary, Subcommittee on the Constitution, Hearing on Partial Birth Abortion (March 21, 1996), available at http://www.nrlc.org/abortion/fetal_pain/Wright%20testimony%20on%20fetal%20pain.pdf.

95. *Id.*

96. Naomi Wolf, *Our Bodies, Our Souls*, THE NEW REPUBLIC, Oct. 16, 1995, at 29, 32.

97. Paul Ranalli, M.D., *The Emerging Reality of Fetal Pain in Late Abortion*, NATIONAL RIGHT TO LIFE NEWS, September 2000, at 14, *available at* http://www.nrlc.org/news/2000/NRL09/ranalli.html.

obstetrics, gynecology, fetal medicine, and pediatrics, including two past presidents of the American Academy of Obstetrics, wrote an open letter to the President, advising him, with appropriate citations to medical developments in ultrasonography, fetoscopy, and the study of fetal electrocardiograms and electroencephalograms (EKGs and EEGs), that "in drawing attention to the capability of the human fetus to feel pain, you stand on firmly established ground."[98]

The point in all this is not that the fetus definitely feels pain at the eighth week, or the seventeenth week, or the twenty-sixth week. The point is that there is an *honest doubt*, and the oddly inexplicable thing about the influence of the pro-choice movement on our society's and other societies' approach to the question of fetal pain has been that our society and other societies have resolved that honest doubt *against* the conclusion that fetuses can feel pain at any point in the pregnancy, up to and including the nearly full-term partial-birth abortions.

Abortion methods may be distasteful to our sensibilities, but they are biological facts, and they must be examined if the morally important questions of fetal pain and fetal personhood are to be looked into seriously and not polemically. The following are descriptions of abortion methods used today:

> (1) The *suction-aspiration* or *vacuum-curettage* technique commonly used in early pregnancies, and most often at or after the eighth week, involves the violent tearing and dismemberment of the fetus by a powerful suction tube with cutting edges.
>
> (2) The *dilation-and-curettage* method (*D&C*), also used during the first trimester, and again most often at or after the eighth week, involves cutting the baby's body into pieces with a loop-shaped steel knife, and scraping the body parts into a basin.
>
> (3) The *RU-486* method, also used during the first trimester, involves the ingestion of two synthetic hormones which block the action of the natural hormone that provides nutrients to the lining of the uterus, thus starving the fetus, and then the induction of labor and the expulsion of the fetus from two to five days later.
>
> (4) The *methrotrexate* procedure is similar to the RU-486 method, except that the synthetic hormones are injected intramuscularly instead of taken in pill form.
>
> (5) The *dilation-and-evacuation* method (*D&E*), commonly used after twelve weeks and up to twenty-four weeks, involves twisting and tearing the baby's body parts off with forceps with sharp metal jaws,

98. Letter to President Reagan (Feb. 13, 1984), *available at* http://www.mpomerle.com/NoAbort/Reagan.Fetal_Pain.shtml.

> snapping the baby's spine, and crushing her skull for easier evacuation. The fetus dies in the same way that an adult human being would die, bleeding to death while being torn limb from limb.
>
> (6) The *saline-injection* method, or *saline amniocentesis*, commonly used after sixteen weeks and through the third trimester, involves the injection into the amniotic sac surrounding the baby of a poisonous, burning solution and is accompanied by violent fetal kicks and jerks as the baby is burned alive.
>
> (7) The *urea* and *prostaglandin* chemical methods, used in the second and third trimesters, essentially involve the premature inducement of labor and the delivery and subsequent neglect of fetal babies. These methods are in some disfavor because not infrequently the baby survives.
>
> (8) The *partial-birth abortion* technique, known medically as *dilation and extraction (D&X)*, is used in late-term abortions (beyond the fifteenth week and up to the point of full term). It involves the delivery into the open, in the breech position, of the legs, arms, and torso (all but the head) of the baby, the stabbing of the points of surgical scissors into the base of the skull of the all-but-delivered baby, the insertion of a suction device into the stab hole, the suction removal of the baby's brain, the crushing of the emptied skull, and then the completion of the delivery of the corpse of the baby. If the baby herself cannot cry out, this business of aborting fetal children itself cries out to any sane society for moral review and analysis.[99]

Mother Teresa of Calcutta once said, with obvious reference to the United States (she made the remark at the National Prayer Breakfast in Washington, D.C.): "Any country that accepts abortion is not teaching its people to love, but to use any violence to get what they want. This is why the greatest destroyer of love and peace is abortion."[100] The then-Surgeon General of the United States, Jocelyn Elders, later verbalized one of the pro-choice movement's responses to Mother Teresa: "We would like for the right-to-life and anti-choice groups to really get over their love affair with the

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99. *See, e.g.*, HEALTH AND SOCIAL SERVICES, STATE OF ALASKA, PUBLIC HEALTH: MAKING A DECISION ABOUT YOUR PREGNANCY 24-29 (2005), http://www.hss.state.ak.us/dph/wcfh/informedconsent/docs/informedconsent.pdf; LifeSiteNews.com, Abortion Methods – Surgical Abortions, http://www.lifesitenews.com/abortiontypes (last visited Oct. 12, 2008); LifeSiteNews.com, Abortion Methods – Chemical Abortions, http://www.lifesitenews.com/abortiontypes/chabortion_types.html (last visited Oct. 12, 2008).

100. Mother Teresa of Calcutta, Speech at the National Prayer Breakfast, Washington, D.C. (Feb. 3, 1994), http://www.priestsforlife.org/brochures/mtspeech.html.

fetus."[101] It is perhaps the single greatest moral judgment on our society that we seem, up to now, to have adopted Jocelyn Elders' sensitivity in the abortion debate, rather than Mother Teresa's.

## CONCLUSION

If *Roe* is to be overturned, the decision overturning it will almost certainly be positivist in tone, i.e., confined to fair interpretations of the concepts and principles announced in the Constitution itself. If, beyond being positivist in tone, it is also thorough in scope and takes into account the Constitution's expressed value orientation towards *posterity*'s entitlement to the right to live and to enjoy the Blessings of Liberty, it may be a pro-life decision as well.

101. Floyd G. Brown, *Life and Death in Arkansas*, NATIONAL REVIEW, Apr. 26, 1993, at 38, 40.